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Supreme Court of the United States

October Term, 1935.

No. 349.

MAYFLOWER FARMS, INC.,

Appellant,

v.

CHARLES H. BALDWIN, Commissioner of The Department of Agriculture and Markets of the State of New York, Et Ano.

Appeal From The Supreme Court of The State of New York.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1935.

MAYFLOWER FARMS, INC., *Appellant,* against CHARLES H. BALDWIN, Commissioner of the Department of Agriculture and Markets of the State of New York, and KENNETH F. FEE, Director of the Division of Milk Control and Department of Agriculture and Markets of the State of New York, *Appellees.*	*No. 349.*

On Appeal from the Supreme Court of the State of New York.

BRIEF FOR APPELLANT.

Opinions Below.

The dissenting memorandum of the Appellate Division, Third Department, of the State of New York, is reported at 242 App. Div. 881.

The prevailing and dissenting opinions of the Court of Appeals of the State of New York are reported at 267 N. Y. 9.

Statute and Constitutional Question Involved.

The statute of the State, containing the four words which are challenged as unconstitutional in this case, is familiarly known as the New York State Milk Control Law. It is embodied in articles 21 and 21-A of the Agriculture and Markets Law of the State of New York, as added by Chapter 126 of the Laws of 1934 (Laws of New York, 1934, Official Volume, p. 564).

The only part of the statute involved herein which is challenged as unconstitutional is the time limitation created by the words "since April tenth, nineteen hundred thirty-three" which are found in the following quoted last sentence of Section 258-q of article 21-A of the Agriculture and Markets Law of the State of New York (Laws of New York, 1934, Official Volume, p. 580):

> "It shall not be unlawful for any milk dealer who *since April tenth, nineteen hundred thirty-three* has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

The constitutional question in this case is:

Do the words "since April tenth nineteen hundred thirty-three" in the unadvertised differential provision

quoted above, which prevent the Appellant from exercising the privilege thereby conferred, deny to the Appellant due process and the equal protection of the laws contrary to the fourteenth amendment to the Constitution of the United States?

Statement of Case.

This is an appeal from an order and judgment of the Supreme Court, Albany County, of the State of New York, entered upon the remittitur and decision of the Court of Appeals of the State of New York, handed down April 16, 1935. Probable jurisdiction was found by this Court on October 14, 1935.

The said order and judgment affirmed the order of the Appellate Division, Third Department, which confirmed the determination made by the Appellees on July 9, 1934, which denied the Appellant's application for a milk dealer's license.

In the Appellate Division, the three Justices who voted to confirm the action of the Appellees wrote no opinion and made no statement in justification of their decision. Of the two Justices who dissented, Mr. Presiding Justice James P. Hill wrote a short, but sharp, dissenting memorandum (R., p. 48). In the Court of Appeals of the State of New York there was again a division of opinion. Both the prevailing and dissenting opinions have been made a part of the record herein, pursuant to rule of this Court (R., pp. 49-60). A motion for re-argument was made by the Appellant and was denied without opinion on May 28, 1935.

Mayflower Farms, Inc., the Appellant herein, is a corporation organized under the laws of the State of New York in the month of May, 1933 (R., p. 22). On September 6, 1933, it received a milk dealer's license, pursuant to the 1933 Milk Control Law (R., p. 28). That license was revoked by a revocation order dated November 22, 1933, effective December 1, 1933 (R., pp. 28-29). The Appellant secured an Order of Certiorari, which stayed the said revocation order (R., p. 29). The said Certiorari Order was dismissed by the Appellate Division for the failure of the Appellant's then attorney to print the case and brief. The reason for the said revocation order was based upon the same ground as that upon which the Appellees based their denial of the Appellant's present application and hence will not be considered separately as an issue in this case (R., pp. 45, 33).

On or about April 28, 1934, the Appellant made an application for a milk dealer's license under the 1934 Milk Control Law (R., p. 11). The license fee of twenty-five dollars ($25.00) accompanied the application and was and still is retained by the Appellees (R., p. 17). On or about June 18, 1934, a hearing upon said application was held, at which Appellant's president, Mrs. Bertha Silberman, appeared and was examined under oath (R., p. 21, *et seq.)*. Upon said examination the following principal and undisputed facts were adduced:

1. That Appellant does a small volume of business, having only one route (R., p. 26), containing approximately 50 store customers (R., p. 27), to whom it sells and delivers milk at wholesale (Exhibit No. 3, R., p. 20).

2. Mrs. Silberman's husband, Maxwell Silberman, handles Appellant's one route, being the driver and the collector (R., p. 26); he was born and brought up in the milk business all his life (R., p. 30).

3. Appellant purchases its milk from the Supreme Milk & Cream Co., a New Jersey corporation, located at Perth Amboy, N. J. (R., p. 12) under Supreme's trade name "Puritan" (R., p. 35).

4. All of the milk it purchases is Grade "B" milk (R., p. 27).

5. It is an unadvertised brand of milk or, in other words, *milk that does not have a well advertised trade name* (R., p. 35).

6. At least five other independent milk wholesalers, like the Appellant, buy the same identical milk from the Supreme Milk and Cream Co. and sell it to stores as an unadvertised brand of milk (R., p. 35).

7. In the districts and on the same streets where the Appellant's customers' stores are located, there are other stores buying the same kind of milk appellant sells, from Appellant's competitors (R., p. 38).

8. Appellant is losing customers because its competitors get a lower price for the same kind of milk Appellant sells (R., p. 40).

On or about July 9th, 1934, the Appellees made the order under review herein denying the application of Appellant (R., p. 46), based upon the recommendation

of Mr. Harnach, who presided at the hearing (R., p. 22). The reason given was that the Appellant had violated a price-fixing order in that it sold its milk at the unadvertised price, which was one cent per quart below the price fixed by the Appellees for the sale of milk having a well advertised trade name and the Appellant, not having been in business on April 10, 1933, was not entitled to utilize the one cent unadvertised price differential provided for in section 258-q of the agriculture and markets law, effective April 1st, 1934 (R., p. 45). The Appellant is continuing to do business as a wholesale milk dealer in the city of New York, pursuant to the order of Hon. Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York (R., p. 66).

Assignment of Errors.

The Assignment of Errors will be found at pages 64 and 65 of the Record. All six assignments are strongly urged by appellant.

Summary of Argument.

I. The time limitation created by the words "since April tenth, Nineteen Hundred Thirty-three" in the unadvertised differential provision, which prevents the Appellant from enjoying and exercising the privilege thereby conferred is, UPON ITS FACE, arbitrary, discriminatory, irrational and unconstitutional and denies to the Appellant due process and the equal protection of the laws guaranteed by the fourteenth amendment.

II. The Appellant falls naturally into the natural class of unadvertised milk dealers in the City

of New York for whose benefit the price differential provision was enacted and, as a member of such class, is entitled to exercise the one cent per quart underselling privilege granted by such provision.

III. The time limitation is separable and may be excised from the unadvertised differential provision without doing violence to the intention of the legislature and without hampering or impairing the effectiveness of the provision or the Milk Control Law. On the contrary, its deletion will carry out the purpose of the provision and of the entire law.

ARGUMENT.

POINT I.

The time limitation created by the words "since April tenth, nineteen hundred thirty-three" in the unadvertised differential provision, which prevents the Appellant from enjoying and exercising the privilege thereby conferred, is, UPON ITS FACE, arbitrary, discriminatory, irrational and unconstitutional and denies to the Appellant due process and the equal protection of the laws guaranteed by the fourteenth amendment.

A. QUESTIONS NOT INVOLVED.

At the outset the appellant wishes to state what questions are not involved in the case at bar.

The Appellant concedes that the validity of the milk control law of the State of New York, in its broad aspects, is no longer open to question in view of this court's decision in Nebbia v. New York, 291 U. S. 502. The power of the State of New York to fix *uniform prices* at which milk shall be bought and sold within

the state, according to its grade and utilization and the character of the seller, was there squarely and unconditionally upheld. In the case at bar, a provision is under fire which, quite obviously and, upon its face, results in the fixing of *different prices* for the *same grade* of milk sold by the *same character* of milk seller.

The appellant likewise concedes the validity of the main classification provided for in the unadvertised differential provision, which divides milk dealers in the City of New York into two groups—those who sell milk having a well advertised trade name and those who sell unadvertised brands. It could not do otherwise because, being in the class of unadvertised milk dealers, it would not be entitled to assert and complain of the unconstitutionality of the provision with respect to the class of well-advertised milk dealers against whom the provision operates. Southern Rwy. Co. v. King, 217 U. S., 524, 534; Arkadelphia Co. v. St. Louis S. W. R'y Co., 249 U. S., 134, 149. Moreover, after much testimony was taken by a special master, pursuant to the direction of this Court in Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, the classification of milk dealers in the City of New York on the basis of the well advertised trade name factor, has been held to be constitutional (11 F. Supp. 599). Unless and until that decision is reversed by this Court, the constitutionality of that classification is not subject to question.

The appellant is affected adversely only by that part of the unadvertised differential provision which prevents it from exercising the one cent per quart underselling privilege conferred by that provision upon dealers selling unadvertised brands of milk in cities hav-

ing a population of one million or more, namely, the words: "since April tenth, nineteen hundred thirty-three."

For the purposes of this case, therefore, the last sentence of §258-q of the Agriculture and Markets Law, familiarly known as the unadvertised differential provision, should be considered as a little law standing by itself and not physically incorporated in the milk control law of the State of New York, the validity of which is not questioned and with the purposes of which the appellant is in full sympathy.

For convenience of reference throughout the argument, the said last sentence of §258-q will be referred to as the "unadvertised differential provision" or the "differential provision" and the words "since April tenth, nineteen hundred thirty-three", in said provision, will be referred to as the "time limitation".

B. THE CASE AGAINST THE TIME LIMITATION.

Under this head, the appellant will not only establish affirmatively that the time limitation is unconstitutional, but will also answer irrefutably the arguments advanced in support of its validity by the Appellees and by the Court of Appeals of the State of New York in its prevailing opinion.

The Court of Appeals clearly erred in assuming that the validity of the time limitation must be determined in the light of the purposes underlying the milk control law as a whole and that the time limitation bore some relation to that law. It incorrectly took the position

that the Legislature must have felt that, in inserting the time limitation in the differential provision, it might tend to accomplish one or more of the objects of the milk control law—vouchsafing the farmer a higher price for his product or stabilizing the industry as a whole. It overlooked the fact that those objects were accomplished completely, or as completely as it was within the Legislature's power to do so, when it provided that (1) every dealer should pay the farmer a fixed price for his milk, (2) every dealer should charge a fixed resale price to the storekeeper, and (3) every storekeeper should charge a fixed resale price to the consumer.

We shall see that the time limitation bears no relationship whatsoever to any of the purposes of the milk control law as it affected the farmers and the consumers, the two great classes in the light of whose interests the validity of any such law passed in the exercise of the police power must be determined.

The validity of the time limitation must be determined only in the light of the purpose underlying the differential provision in which it is contained *and by the principles and decisions of this court governing permissible classification under the equal protection clause of the Fourteenth Amendment.* That purpose, as we shall see, was the protection of the unadvertised dealers against the well advertised dealers under a system of uniform resale prices. Borden's Farm Products Co. v. Baldwin, 293 U. S. 194. It was accomplished by giving to the unadvertised dealer a one cent per quart underselling privilege. The new unadvertised dealer needs that privilege just as much, if not more, than the one who was in business on April 10, 1933.

Construed in the light of the reason for and the legitimate purpose of the differential provision, the police power, the emergency power and no other power on earth or under the sun can give any validity to the arbitrary and discriminatory time limitation.

1. Its Origin.

Having been inserted in and enacted as a part of the unadvertised differential provision, the time limitation has no history separate from that of the provision in which it is contained. The provision in its entirety was attacked as unconstitutional by the Borden's Farm Products Company in Borden's Farm Products Co. v. Baldwin, 7 Fed. Supp. 352, and subsequently in this Court in the same case, 293 U. S. 194. The opinions in that case traced the history of that provision in great detail and we think it unnecessary to restate here what was said there. More will be said about the reasons which led to its enactment under the third point of this head.

In the Borden case, *supra*, the independent, unadvertised milk dealers in business on April 10, 1933, for whose exclusive benefit the provision was enacted asked for and received leave from this Court to intervene and file a brief. In that brief, excerpts from speeches made by milk dealers from the City of New York, attending a joint hearing held upon the proposed milk control bill on March 23, 1934, were appended. In all of these excerpts, the legislature was exhorted to enact the differential provision so that the dealers selling unadvertised brands of milk would be able to compete with the dealers selling advertised brands

of milk. None of the speakers offered any reason why the underselling privilege granted by the provision should be limited to those unadvertised milk dealers engaged in business on April 10, 1933.

It is interesting to note that in the case at bar, no permission to intervene is sought by the unadvertised dealers benefited by the provision. The inevitable conclusion is that they could not show this Court any reason why they should have been singled out by the legislature as a select group and armed with such a powerful weapon as the under-selling privilege is.

2. It Has No Relation to the Purposes of the Milk Control Law.

The broad general purpose of the milk control law was to protect the farmer and milk producer by giving them a fair return for their product and to preserve the dairy industry from destruction and ruin attributed to unfair competition and price-cutting of milk dealers by fixing a *uniform* fair price at which milk should be sold.

With these major purposes in view, we analyze the time limitation. The price which the farmer and milk producer receive for their milk is fixed by price-fixing orders. It does not vary with the character of the milk dealer purchasing the milk. The price is the same whether it is sold to an advertised dealer or to an unadvertised dealer engaged in business either before or after April 10, 1933, and regardless of the number of dealers in the field.

Looking at the law from the consumer's viewpoint, the time limitation not only does not benefit but is actually a detriment to him. The price he pays for milk is fixed by price-fixing orders. If he buys milk from a storekeeper who is supplied by an unadvertised dealer engaged in business on April 10, 1933, he gets the benefit of a lower price of 1¢ per quart. But if he should be foolish enough to go to a storekeeper supplied by an unadvertised dealer who engaged in business after April 10, 1933, the same, identical milk will cost him 1¢ per quart more—the same price for which he could procure one of the well-advertised brands of milk.

The fixing of a *uniform* price for dealers effectually prevents the unfair competition and the destructive price-cutting activities that threatened the destruction and demoralization of the industry. The root of all evils in the milk business was thus destroyed by the stabilization of price throughout the industry.

3. It Has No Relation to the True and Lawful Purpose of the Unadvertised Differential Provision.

As foreign as the time limitation is to any purpose of the milk control law, it is still more so with respect to the unadvertised differential provision in which it is contained. If the words "since April tenth, nineteen hundred thirty-three" had been omitted from the provision, as they should have been, the purpose of the provision—to enable the unadvertised dealers to meet the competition of the well advertised dealers who, it was feared, would monopolize the business under a system of uniform resale prices—would have been fully and lawfully carried out. There was no reason

for its inclusion other than the selfish desire on the part of the independent dealers in business on that date not only to be protected against the well advertised dealers but to shut the door to new unadvertised dealers. Of that desire more will be said under Point 4. The same reason exists for giving the under-selling privilege to unadvertised dealers entering business after April 10, 1933, as for those in business prior to that date—they must, equally with existing dealers, be protected against the well-advertised dealers.

4. Its Real Purpose is to Create a Monopoly.

The ground chiefly urged in support of the validity of the entire differential provision in the Borden case, *supra*, was that it was intended, not without reason, to be a safeguard against monopoly. Quite evidently that argument induced the legislature to enact that provision. Strangely enough, it made very little impression upon this court if the language used by this court in its opinion at pages 205 and 206 is analyzed and studied. But the time limitation here in question which was not even mentioned by this court in that opinion is clearly designed to create a quasi-monopoly, if not an absolute monopoly in favor of the unadvertised dealers, at whose insistence the provision was enacted —not monopoly in the technical sense, but in the sense that the business would tend to become concentrated in the hands of a small group of unadvertised dealers —those in the field on April 10, 1933. It is undisputed that the differential provision was not requested or suggested by the only fact-finding agency set up by the legislature to study the problems of the milk emergency. Thus in Borden's Farm Products Co. v. Bald-

win, *supra*, p. 205, this court, speaking of the differential provision, said:

> "The legislative committee did not, however, recommend the fixing of the differential here in question, and hence did not state grounds in support of such a discrimination."

And, in a footnote on that same page:

> "It appears that in the case of both the acts of 1933 and 1934, the provision in question was added in the course of legislative consideration of proposed measures and at the instance of dealers described as independents, 7 F. Supp. p. 353."

The time limitation, bearing, as we have seen, no relationship to the true and lawful purpose assigned by the unadvertised dealers who pleaded with the legislature for the benefit of the differential, namely,—protection against the well-advertised dealers—can only be explained as follows: When the unadvertised dealers perceived that they had succeeded in convincing the legislature that the enactment of the 1¢ differential was absolutely necessary for their continuance in business, the fundamental and normal instinct of self-preservation which motivated them in demanding the inclusion of the provision, degenerated, at the same time, into the base instincts of selfishness and destruction. Having been assured a finger, they wanted the whole hand. They were not satisfied with the protection the differential would give them against the well advertised dealer. They were not content with preserving the *status quo* as to prices, which they claimed, existed between them and the well advertised dealers at the time and just prior to the time the first milk control law became effective. They saw an opportunity to

burn the bridges behind them so they decided to prevent any dealers from thereafter coming into their own class and obtaining the benefit of the differential, although such dealers might in every conceivable respect be in the same class. In effect and in fact they purposed to render it impossible for others to come into their business in competition with them. It was their intention and desire to become, after April 10, 1933, an exclusive fraternity, to which no other milk dealer could become eligible for membership. Stated differently, on the one hand, they sought to prevent the well advertised dealers from enjoying a monopoly and, on the other hand, they became crazed with the desire for just such a monopoly for themselves as against new dealers entering the field. On the one side, they proclaimed their wish for the preservation of competitive opportunities alleged to have existed before the statute and, on the other, they desired to abolish and wipe out new competition—a factor always present before the enactment of the milk control laws, namely—the normal and natural emergence of new dealers into the field.

Apparently they did not dare to ask the legislature expressly and directly to prohibit new dealers from engaging in business so that their monopolistic desires might be realized. So they sought to accomplish by indirection what they could not obtain directly. They artfully devised the time limitation and inserted it in the privilege provision for the purpose of effectuating their insidious and invidious intentions.

It is interesting to note in this connection that some of those unadvertised dealers were bolder than others.

For example, one E. F. Cook is quoted, in an excerpt set forth at page 31 of the brief of the independent dealers in the Borden case, *supra*, and taken from page 106 of the original minutes of the Joint Legislative Hearing of 1934 on the Pitcher milk control bill, as having asked for the insertion of a 1¢ differential provision which would be limited to those dealers who had been engaged in the milk business for *five years* preceding the effective date of the bill.

What human right, what moral or legal power these independent dealers invoked to frustrate man's inalienable right to enter and engage, on a basis of equality, in an innocent and lawful occupation, no one knows. By what divine right or legal justification they felt themselves entitled to such protection as would create for themselves a virtual monopoly, no one has been able to discover.

The time limitation was a phrase surreptitiously sandwiched into the differential provision. It was merely something which the independent dealers then in business put over on the legislature. It formed no natural part of the differential provision and was absolutely unnecessary to carry out any legitimate purpose of either the entire law or of the differential provision alone. (See points 2 and 3.) It was inserted in the provision for the sole purpose and had the effect of either absolutely prohibiting the entrance of any new unadvertised dealers or of putting any new unadvertised dealer, courageous enough to apply for admission, into the class of well advertised dealers where his death would surely ensue.

5. Its Effect is to Prohibit New Dealers from Entering the Field.

The effect of the time limitation is the same as if the law provided that no new milk dealers shall be licensed. As stated in the dissenting opinion in the court below (R., p. 57),

> "When we approach the case at bar from the standpoint of an individual who desires to enter the milk business, we find that the door is effectively closed to him. Denying the individual the price differential is as effective as a direct prohibition. Mr. Justice Cardozo in discussing the same milk control law in Hegeman Farms Corporation v. Baldwin, 293 U. S. 163, 169, said: 'What is fixed is a minimum only. None the less, the competition among dealers is so keen that in practice the legal minimum is the maximum that the appellant [an unadvertised dealer] is able to charge.' (Words in brackets inserted.)"

To like effect was the dissenting memorandum of Mr. Presiding Justice Hill of the Appellate Division (R., p. 48).

Even the Court of Appeals, in its prevailing opinion, admitted that prohibition was the effect of the time limitation. 267 N. Y. at p. 15 (R., p. 55).

The appellant submits that the Court of Appeals, recognizing, as it did, that prohibition was the effect of the time limitation, erred in failing to condemn it as unconstitutional upon that ground alone.

The milk business, unlike the liquor traffic, gaming and other businesses *malum in se*, is a lawful, common and ordinary calling which may be regulated but not

prohibited by the legislature. People v. Beakes Dairy Co., 222 N. Y. 417, 427; People *ex rel.* Tyroler v. Warden, etc., 157 N. Y. 116; Fisher Co. v. Woods, 187 N. Y. 90; Adams v. Tanner, 244 U. S. 590.

In Weaver v. Palmer Bros., 270 U. S. 402, 415, this court said:

> "The constitutional guaranties may not be made to yield to convenience. Schlesinger v. Wisconsin, 270 U. S. p. 230. The business here involved is legitimate and useful; and while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment." Adams v. Tanner, 244 U. S. 590, 596; Meyer v. Nebraska, 262 U. S. 390; Burns Baking Co. v. Bryan, 264 U. S. 504.

6. It Cannot Be Supported by the Argument that It Was Intended to Prevent New and Injurious Competition; Such Competition was and is Directly and Effectively Prevented by § 258-c Which the Court Below Completely Overlooked.

The meat of the decision of the court below lies in its belief, expressed at page 55 of the record, that the Legislature might have felt that new competition in the milk business might prove injurious to the result that it intended to accomplish by the Milk control law and that, consequently, it must have intentionally designed the time limitation for the purpose of preventing new dealers from coming into the field.

The appellant points out that the court, in advancing that argument in support of the time limitation, completely overlooked the first sentence of §258-c of the milk control law, which reads as follows:

"§258-c. Granting and revoking licenses. No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, *that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest.* * * *" (Italics ours.)

If the Legislature feared the result of and desired to prohibit new, unnecessary and injurious competition, as the court said it must have, the appellant submits that the section above quoted directly, expressly, effectively and completely prevents such competition and was the vehicle directly and explicitly fashioned and exclusively relied upon by the Legislature to accomplish that purpose.

Of course, the provisions of section 258-c and their validity are not at all involved in the case at bar. The section is merely referred to by appellant to show the fallacy underlying the reasoning of the court below. A mere comparison shows that the time limitation has the effect of absolutely and unconstitutionally prohibiting new dealers (see point 5) whereas §258-c merely regulates the licensing of but does not prohibit new dealers.

7. It Cannot Be Supported by the Argument that the Provision Containing It Was Enacted to Preserve the Status Quo of the Milk Dealers in Business on April 10, 1933.

It is logical to assume that the unadvertised dealers needed the 1¢ per quart differential to compete with the well advertised dealers. But why was it necessary to limit the underselling privilege to those unadvertised dealers in business on April 10, 1933? Was it because the unadvertised dealers enjoyed freedom from competition of new unadvertised dealers prior to the enactment of the milk control law? Of course not. The normal and natural emergence of new dealers had always been a factor which milk dealers had to contend with (dissenting opinion, R., p. 58). The time limitation cannot be justified on the ground that the differential provision containing it preserves the *status quo* of the milk dealers in business on April 10, 1933, because by preventing new dealers from entering the business, the time limitation destroys rather than continues competitive opportunities as they formerly existed. *In effect, the legislature said to the unadvertised dealers of April 10, 1933: "You are our chosen people. We selected you as a group to engage in the milk business without fear of new competition. We will allow you to undersell the advertised dealers so you need not fear them. At the same time we will give you more than you need—more than you are entitled to. We will not permit any new dealers to have the underselling privilege. That will effectively prevent new dealers from entering the field."*

8. It Cannot Be Supported by the Argument That the Well Advertised Dealers Would Form Unadvertised Subsidiaries.

The court below attempted to justify the time limitation in the following language, (R., p. 56):

> "The act not only had the effect of limiting to those engaged in the unadvertised milk business, at the date of the first act the privilege of the differential, but it also prevented the large holding companies, known as advertised dealers, from dissolving those companies and permitting the subsidiary corporations thereof from engaging in the sale of milk in competition with the unadvertised dealers and enjoying the privilege of selling at one cent per quart less than the uniform price. It might reasonably anticipate such action on the part of the large holding companies. It might also reasonably foresee that such action would result in driving unadvertised dealers from the field, with great financial loss to them and to thousands of farmers who were dependent upon them for a market for their milk, thus tending to defeat the very purpose which the differential clause was enacted to prevent."

The dissenting opinion simply and effectively answers this argument as follows, (R., p. 59):

> "Another reason given is that the advertised dealers might permit their subsidiaries to enter the field of the independent dealer. As the only justification for the differential against the advertised dealer is the potent sales appeal of the well-advertised name, no reason remains when the company sells the milk under another name. Thus does the monopoly given to the independent dealers stand without justification or reason."

The truth of the matter is that the advertised dealers always had had and now have subsidiary or af-

filiated companies doing business under unadvertised names. Under such names, they are entitled to sell at the unadvertised price. Without the benefit of the widely-heralded well-advertised trade name, they have no greater selling advantage than other unadvertised dealers, and constitute no threat to the latter. It is only when milk is sold under the name of Borden, Sheffield, Dairymen's League or Renken (the four dealers thus far placed on the well-advertised list) that it is sold as an advertised brand. Should any such subsidiaries, as well as any other unadvertised dealers, become sufficiently well known to the trade, they will likewise be placed upon the well-advertised list. Admitted then, that the advertised dealers would form subsidiaries to sell milk under unadvertised names, that is no reason why unadvertised dealers starting after April 10, 1933, like the appellant, qualified in every respect, should be denied the underselling privilege.

9. It Cannot Be Supported on Emergency Grounds.

The court below seemed to place great emphasis upon the fact that the milk control law fixes prices only during an emergency period and that, therefore, the legislature could lawfully deny the appellant the right to undersell the well-advertised dealers.

There is no magic or mystery in the word "emergency." It does not create any new rights in the State; it merely provides the scene for the exercise of powers which have always inhered in the State under its general police power. It furnishes the State with the occasion to invoke its police power and do some things

which in ordinary times and under ordinary circumstances it could not do. But those things and the statutes authorizing them, because of their drastic character, must, more so than ever, have a reasonable relation to the purpose sought to be accomplished; that is, they must have a natural, or at least reasonable, tendency to avert or remedy the consequences of the dangerous or unusual conditions which constitute the emergency. That the time limitation bears no relation at all to any legitimate purpose has already been shown. (See Points 2 and 3 under this head.)

If the differential provision had excepted from its operation and benefit all those dealers who had blond hair or blue eyes, or were unmarried, or those dealers under thirty-five years of age, or who had stores on 42d Street—could it be reasonably argued that any emergency, no matter how great or severe, would justify such discrimination?

Neither emergency nor police power is a valid excuse for arbitrary classification or selection of that character or of the character of the time limitation here in question. A classification based upon the time when an unadvertised dealer came into the business has no more relation to the purpose of the differential provision—to enable unadvertised dealers to compete with advertised dealers—than a classification based upon the color of the dealer's hair or eyes, whether he is single or married, has or has no children, has a place for business on a particular street or is of a certain age. (See examples of arbitrary classification under Point II.)

In either case it is plain that the exception is not in the public interest, but obviously only in the interest of the class benefited by the privilege conferred and it must therefore be condemned as unconstitutional. See People v. Ringe, 197 N. Y. 143, 149-51; Hauser v. N. B. & Merc. Ins. Co., 206 N. Y. 455, 461-5.

The fact that the milk price-fixing law is to be effective during a period of emergency specified in the act (the period has been twice extended for periods of one year each), does not give any validity to the time limitation. *The equal protection clause of the federal constitution does not permit of any evasion of its prohibitory terms for even a minute, much less for three years and perhaps longer.* (See *Ex parte* Milligan, 4 Wall. 2, 120; Boyd v. United States, 116 U. S. 616, 635; Block v. Hirsh, 256 U. S. 160, 165, 166, 168.)

A statute which clearly denies the equal protection of the laws guaranteed by the federal constitution cannot be upheld simply because that denial will be of temporary duration. The time limitation here in question denies the appellant the equal protection of the laws. Is it any satisfaction to this appellant to be told that at some future time the ban may be lifted and it may then engage in business on equal terms with its competitors?

The court below erred in supporting its decision in this case on emergency grounds because, as we have seen, the time limitation has absolutely no connection with and does not alleviate in any way the emergency created by the farmer's milk strikes and the dealers' price-cutting activities which gave rise to the enact-

ment of the milk control law; nor does it aid the public, the farmer or the milk producer; it merely grants an exclusive privilege to the unadvertised dealers in business on April 10, 1933 and a favor to the four advertised dealers by effectively preventing new competition.

10. It Cannot Be Supported as a Legitimate Exercise of Police Power.

Surely, the limitation of time, arbitrarily dividing a group of independent milk dealers selling unadvertised milk into those who were engaged in business prior to April 10, 1933, who are given the privilege of utilizing the price differential, and those who engaged in business subsequent thereto, who are deprived of that privilege, cannot be upheld as a valid exercise of the police power.

That power may justifiably be exercised only when it appears that the interests of the public generally, *as distinguished from those of a particular class,* require it, and when the means used are reasonably necessary for the accomplishment of the desired end, and are not unduly oppressive (Lawton v. Steele, 152 U. S. 133, 137; Colon v. Lisk, 153 N. Y. 188, 196; Wright v. Hart, 182 N. Y. 330).

In order to sustain legislation under the police power, the Courts must be able to see that its operation tends in some degree *to prevent some offense or evil,* or *to preserve public health, morals, safety and welfare.* If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the Courts to declare it invalid, for legislative attempt to abridge or hamper

the right of a person to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government (Lochner v. New York, 198 U. S. 45).

There is nothing in that dividing phrase—since April 10, 1933,—which protects or promotes the public health, morals, safety or welfare. The provision in which it is found does not provide for one set of qualifications for milk dealers who were engaged in business prior to April 10, 1933 and another and more stringent set for those who began thereafter—all milk dealers must have the same qualifications under the law. Once given a license to sell milk, the new milk dealer should be treated in the same manner as the one already in business.

We have no doubt but that the Legislature could validly provide for stricter regulations as conditions precedent to obtaining a license by those wishing to come into the business after a certain date. (Sperry & Hutchinson Co. v. Rhodes, 220 U. S. 502; Watson v. Maryland, 218 U. S. 173; People v. Griswold, 213 N. Y. 92 and kindred cases.) Or regulations could be made based on any number of distinctions, for example—the grades of milk sold, the character of distribution, wholesale or retail, amount of milk sold in a week, month or other period, size of plant or business, etc., and classifications might be made based on such differences, but all in the same class would necessarily have to be treated alike without regard to when each dealer started in business.

However, to prescribe different qualifications for entrance into the business, or to prescribe regulations covering the different classes is entirely different from proscribing, in effect, the right to engage in such business altogether.

The appellant is an independent milk dealer selling an unadvertised brand of milk to other milk dealers (store owners). It is undisputed from the record that the identical brand of milk sold by appellant is sold by several other independent milk dealers (competitors of appellant) to stores located on the same streets as the stores of certain customers of appellant (R., p. 38). Why should the appellant have to charge one cent per quart more for its milk than its competitors charge? The appellant is in the same class with these competitors—why should it be subjected to such unfair discrimination?

The case of Connolly v. Union Sewer Pipe Company, 184 U. S. 540, discusses the police power of states and its relation to the equal protection clause of the federal constitution. We quote from that decision. First, at page 558, this court said:

> "The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. Gibbons v. Ogden, 9 Wheat 1, 210; Sinnott v. Davenport, 22 How. 227, 243; Missouri, Kansas & Texas Railway v. Haber, 169 U. S. 613, 626."

And at page 563, this court concluded as follows:

> "But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity * * * Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

The time limitation does exactly what the Connolly case forbids. It makes criminal the sale of milk at the unadvertised price by the appellant although the sale of milk at the same price by appellant's competitors—the same class of dealers—is lawful.

In the case of Truax v. Corrigan, 257 U. S. 312, at page 333, this court, speaking of the equal protection clause, said:

> "Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

Tested by these decisions and those cited hereafter under this head, the time limitation stands revealed in

its true light. It does not protect the public morals, the public health or the public safety or welfare. It does not aid the farmer, the public or the consumer. It is intended to aid only the independent unadvertised dealers in business on April 10, 1933, by giving them a monopoly, or the four well advertised dealers, by preventing competition from unadvertised dealers entering business after April 10, 1933.

The dissenting opinion of the court below (R., pp. 58, 59) clearly shows up the time limitation for what it really is:

> "The record shows that the identical brand of milk sold by appellant is sold by several other independent milk dealers, competitors of appellants, to the same class of retailers in the same stores and on the same streets. Why should the appellant have to charge one cent more per quart for his milk than his competitors charge? The appellant is in the same class with these competitors. Why the unfair discrimination? Without any apparent justification it discriminates between one entering the milk business prior to April 10, 1933, and a dealer entering on the next day. One looks in vain to find a reason for this discrimination. The only reason given is that the Legislature did not wish to increase or intensify the competition against the advertised dealers by permitting new dealers to join the class of the unadvertised dealers. In other words, a monopoly was given to the unadvertised dealers so as not to increase the competition against the advertised dealers. *Is it not apparent that this reason is in fact no reason at all and is only given in an attempt to justify an unjustifiable discrimination?*" (Italics ours.)

The mere fact that the time limitation is included within a provision which forms a part of a statute (the

milk control law) concededly enacted in the exercise of and justified by the police and emergency powers of the state does not lend any strength to its validity. In Coppage v. Kansas, 236 U. S. 1, this court said:

> "Now it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of the power. 'Its true character cannot be changed by its collocation.'"

Collocation seems to be quite an important element in the case at bar for, apparently, the court below misinterpreted the true nature of the time limitation simply because of its physical presence in the milk control law.

11. It is Not Based on any Factual Situation.

Time and time again the court below referred to the existence of a factual situation as supporting the right of the legislature to insert the time limitation in the differential provision.

The court below was clearly wrong. There was no factual situation before the legislature with respect to the differential provision or the time limitation within it. At least this court, in Borden's Farm Products v. Baldwin, *supra*, couldn't find any. If it had, it would not have found it necessary to remand that case to the district court for the taking of testimony relative to trade conditions existing in the city of New York just prior to the enactment of the milk control law. And

certainly, if there was no factual situation before the legislature regarding the differential provision, there could not have been any regarding the time limitation because that was merely a portion of that provision.

The court below was confused by the factual situation which gave rise to the enactment of the milk control law as a whole—the facts which the joint legislative committee headed by Senator Pitcher in 1932 gathered and presented to the legislature. Nothing was said by that committee either with respect to the differential provision or the time limitation (Borden's Farm Products Co. v. Baldwin, *supra.)* There were no facts before the Legislature which could have justified depriving the appellant of the right to engage as an unadvertised dealer on the same basis as the unadvertised dealers of April 10, 1933. There could not have been any and there were no facts which would show how many new dealers would normally have entered the field from April 10, 1933, until the end of the successively-extended emergency period or what effect their competition would have upon the farmer or the consumer or even the existing dealers.

The court below must have felt that this court, in the Nebbia case, *supra,* had held that the state could fix prices for milk that were not uniform. Judge O'Brien of the court below concurred in the result solely on the authority of that decision. Appellant respectfully submits that this court by its general language in that decision, did not intend to sanction price-fixing of milk by the legislature that would violate the equal protection clause.

12. It is an Unusual Legislative Expedient and Its Approval Will Establish a Most Dangerous Precedent.

The use by the Legislature of the State of New York of the time limitation in the differential provision is a most unusual expedient. The intervention of government in the ordinary forms of business such as the milk business, in the form of fixing prices, although approved by this court, is itself in the nature of an untried experiment. Here, however, we have a provision which allows a lower minimum price for the same grade of milk sold by the same kind of dealer. The exclusive privilege of underselling was given to the unadvertised dealers who happened to be in business on April 10, 1933. The appellant was organized in May, 1933, and received a license in September, 1933. It was qualified in every respect. Its application for a license under the present law was denied because it claimed the benefit of the underselling privilege. If the provision which denies the appellant that privilege is approved by this court, a most dangerous precedent will have been established.

For example, let us assume that the legislature, for some reason or other, so far intervened in the private pursuits and trades practiced by dentists, lawyers, architects, barbers, *et cetera* as to fix the prices charged by such professional and tradesmen. With the time limitation approved by this court as a precedent, the Legislature could lawfully provide that new dentists, architects or barbers coming into their respective fields after April 10, 1933, or some other arbitrary date must get a specified price, either more or less, than that received by those already practicing or in business, for

whom a standard price is also set up. In other words, the barber going into business on April 11, 1933 and thereafter must charge at least 30¢ for a shave and 60¢ for a haircut, whereas those previously in business may charge 25¢ and 50¢ respectively for those services. Or by such a statute, a new dentist must charge $5.00 for pulling a tooth and the one already established could charge $4.00 therefor. Or that by such a statute, the neophyte at the bar could be compelled to charge at least $10.00 for drawing a deed or mortgage and an attorney admitted to the bar on or before the date specified would be required to charge only $8.00 for the same service.

Such an assumption is not as ridiculous as it appears on its face. The possibility of such legislation is not at all fantastic in view of the great inroads the national and state governments are making in the internal management and conduct of what have heretofore been considered private businesses.

Moreover, this court's approval of the time limitation would effect a radical departure from the principles laid down by this court in the numerous decisions governing arbitrary class legislation. A very important constitutional question is here presented. An answer unfavorable to the appellant will have far-reaching and dangerous consequences. To hold that the New York state legislature could lawfully discriminate between old and new dealers *in the conduct* of an innocent and lawful business, such as the milk business, whether forever or for a day, would be unprecedented in Anglo-American jurisprudence.

To concede the validity of the time limitation would be to concede the power of the legislature in the guise of a regulation to destroy a lawful business—a power which this court has declared in many cases does not exist. Burns Baking Co. v. Bryan, 264 U. S. 504, 513. See also Meyer v. Nebraska, 262 U. S. 390, 399-400; Norfolk Ry. v. Public Service Commission, 265 U. S. 70, 74; Pierce v. Society of Sisters, 268 U. S. 510, 534-535; Weaver v. Palmer Bros., 270 U. S. 402, 412-15; Fairmont Co. v. Minnesota, 274 U. S. 1, 9-11; Liggett Co. v. Baldridge, 278 U. S. 105, 113.

On the other hand, the effect of a decision of this court giving this appellant a license which it deserves and has qualified for, will not disrupt but promote the working of the milk control system of the state of New York. Such a decision will be entirely harmonious with the purposes underlying the milk control law. It will aid the many independent farmers who sell to the independent, unadvertised dealers, by assuring them an additional distribution outlet. They will get the same price from the appellant as they do from the longer established dealers. The consumer will be benefited because he will be able to buy from storekeepers supplied with unadvertised milk by appellant without being made to pay the well-advertised price. The appellant and perhaps a few other dealers similarly situated will be brought under the protective arm of the differential provision as they should have been originally and the state of New York will not thereafter be guilty of grossly violating the prohibition contained in the due process and equal protection clauses of the federal constitution.

The purpose of the fourteenth amendment is to prevent legislatures from making discriminations without any basis; in other words, to do away with arbitrary and unreasonable class legislation. "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. 'Arbitrary selection, it has been said, cannot be justified by calling it classification.'" Southern Ry. Co. vs. Greene, 216 U. S. 400, 417; Gulf Col. & S. F. Ry. vs. Ellis, 165 U. S. 150; Lindsley vs. Natural Car. Gas Co., 220 U. S. 61; St. John vs. New York, 201 U. S. 633; Miss. Pa. Ry. Co. vs. Mackey, 127 U. S. 205; Minn. & St. Louis Ry. Co. vs. Herrick, 127 U. S. 210; Chicago K. & W. R. R. Co. vs. Pontius, 157 U. S. 209; Pacific Ry. Co. vs. Humes, 115 U. S. 572; Barbier vs. Connolly, 113 U. S. 27; Soon Hing vs. Crowley, 113 U. S. 703; Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283, 294; Connolly vs. U. S. P. Co., 184 U. S. 540; Power Manufacturing Co. vs. Saunders, 274 U. S. 490, 493.

The controlling test in construing class legislation is that all in the same class or similarly situated must be equally dealt with. People vs. Reardon, 184 N. Y. 431; People vs. Mensching, 187 N. Y. 8; People *ex rel.* Williams, etc. vs. Metz, 193 N. Y. 148, 164, 5; Musco vs. United Surety Co., 196 N. Y. 459; People vs. O. C. R. C. Co., 175 N. Y. 84.

In New State Ice Co. v. Liebman, 285 U. S. 262 at pages 279-280, the following language appears which might be addressed with the same force and effect to the discriminatory time limitation attacked in the case at bar:

> "There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in the occupation can make and sell all the shoes that are needed.
>
> * * * * * * * * *
>
> And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the federal constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. This principle has been applied by this court in many cases." (Citing many cases.)

Even in the fine dissenting opinion of Mr. Justice Brandeis in which Mr. Justice Stone concurred, at page

285, the dissenting judges recognized the inability of the state to enact discriminatory legislation, by saying: "The action of the State must be held valid unless clearly arbitrary, capricious or unreasonable."

In Yick Wo v. Hopkins, 118 U. S. 356, at page 358, an ordinance purporting to regulate the conduct of the laundry business was condemned in the following language:

> "Class legislation, discriminating against some and favoring others, is prohibited, but legislation, which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.
>
> The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated may conform. It allows without restriction the use for such purpose of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure."

Just as there was an arbitrary line in the Yick Wo v. Hopkins case, *supra,* so, in the case at bar, the time limitation forms the arbitrary line, on the one side of which are the unadvertised dealers who are given the one cent per quart underselling privilege and on the

other side of which are the few unadvertised dealers, like the appellant, who need the same privilege, but are denied it because they started in business after April 10, 1933.

A statute may show on its face that the classification made by it is arbitrary (*The Borden case*, 293 U. S. 194, 210). *If so, without other evidence or competent proof, it must appear, "upon facts of common knowledge or otherwise plainly subject to judicial notice, that the provision should be sustained as resting upon a rational basis consistent with constitutional right"* (*Id.* p. 204). It cannot possibly be said here as it was said in Nebbia vs. People, 291 U. S. at p. 521 that the time limitation "is not on its face arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of treatment." In the instant case there is neither an obvious nor a latent distinction between the two groups of merchants or dealers created by the time limitation. There can be no presumption of the existence of a state of facts justifying such legislative classification, as is here in question, where no state of facts reasonably can be conceived to sustain it. *The time limitation is, therefore, arbitrary on its face, and the appellees must show that it has some rational basis consistent with constitutional right as well as a reasonable relation to a proper legislative purpose.*

The Borden Case, *supra*, pp. 204, 210.
Smith vs. Cahoon, 283 U. S. 553.

This the appellees have failed to do. Throughout the history of this case, they made no answer to appellant's arguments. Apparently, the court below also

ignored completely appellant's arguments addressed to the arbitrary classification made by the time limitation and disregarded the principles underlying permissible class legislation. Appellant has been placed in an unfair position, by being made to assume the burden of showing the invalidity of the arbitrary time limitation. Nevertheless, the appellant has assumed and sustained it; what more can it say than that facts do not exist and that the limitation bears no relation to the purpose of the differential provision to enable the unadvertised dealers to meet the competition of the well advertised dealers, or to the purpose of the entire law to aid the farmer and end price-cutting by establishing uniform prices. (See points 2 and 3.)

The appellees and the court below constantly referred to the existence of a factual situation, but not once have they alluded to a particular fact or facts showing specific details of time, place and condition. It is one thing to say generally that there are facts justifying a classification and an entirely different thing to show what those facts are. It is now high time that the appellees got down to the specific. We are sure that this court wants to know what those facts were as well as what they claim was the legitimate reason for the time limitation. We have a right to know as do other new unadvertised dealers. This court was insistent that it should be supplied with the facts in the Borden case. It is not only the right but the duty of this court to know the factual situation, if there be any, before deciding whether, in any particular case, man's inalienable rights, guaranteed by the Federal Constitution, have been invaded or denied.

We contend that there are absolutely no facts to justify the discrimination at bar. But if there are, by all means, let the appellees or anyone bring them out in the open, so that they may be examined and weighed by this august tribunal in the performance of its constitutional duties. Certainly, if your appellant knew any facts other than what has already been said in preceding points, regarding the purpose of and reason for the time limitation, it would lay them before this court, and attempt to show that they could not possibly justify the arbitrary classification. The truth of the matter is that not only are there no facts supporting the discrimination, but the dividing of one class of milk dealers in two by the mere interposition of a date, and the effectual prohibition of the dealers on this side of the date from going into or continuing in business is such a drastic oppression of man's natural right to engage in a lawful business and such a gross and flagrant abuse of constitutional rights, that it is difficult to even conceive or imagine a set of facts that would justify the time limitation, even in this day of experimental legislation and liberal judicial interpretation or construction.

It is reasonable to assume that if the appellees had the facts they would have pointed them out long before this. If by any stretch of the imagination the courts below could be said to have had judicial notice of any facts relating not to the milk control law generally, but specifically to the time limitation, certainly this court, as it has already stated in the Borden case, does not know them. In the final analysis, it is this court which must have the facts to enable it to pass upon the constitutionality of those four words which, in effect,

make advertised dealers out of new dealers before they even start in business.

The real facts, as presented in this point, show beyond a doubt that the only reason for the inclusion of the time limitation in the differential provision was because the unadvertised dealers then in business wanted it there for their additional protection. Can it be possible that these real facts have a reasonable relation to a proper legislative purpose? A group of milk dealers wish to concentrate all the business in their own hands, and prevent new dealers from coming in. This is the very thing which the differential provision sought to prevent. Where is the justification, legal or otherwise? What about the interests of the public or milk producer? What about the constitutional rights of your appellant? Are they to be entirely ignored?

POINT II.

The Appellant falls naturally into the natural class of unadvertised dealers in the City of New York for whose benefit the price differential provision was enacted and, as a member of such class, is entitled to exercise the one cent per quart underselling privilege granted by such provision.

The general principles governing classifications based upon time are clearly enunciated in 6 R. C. L. at pages 377, 386, as follows:

> "A proper classification must embrace all that naturally belong to the class, and it must not be based on existing circumstances only, or so constituted as to preclude additions to the number included within a class, but must be such as to embrace all those who may thereafter be in similar circumstances and conditions.

> The Classification must not be based on existing conditions only, but provision must be made for future acquisitions to the class as other subjects acquire the characteristics which form the basis of the classification. This principle is of considerable importance when attempts are made to draw distinctions based on time, putting in one class all the instances existing on a designated date, and placing all others in another class. Under certain circumstances, where such a procedure would discriminate unwarrantably in favor of establishments, things or persons existing, or engaged in particular occupations on a given date, the courts have held that the classification is in denial of the equal protection of the laws."

Counsel for appellant have combed the reports for decisions involving discriminatory legislation and numerous examples have been found. Under this point, only the cases involving facts most nearly resembling those involved in the case at bar will be collated and discussed. They all carry out the fundamental principle that whenever classifications are made by legislatures, all who are in the same class or similarly situated *or who may become similarly situated after the effective date of the act,* must be equally dealt with. While no case has been found "on all fours" with the case at bar, most of the cases found have condemned statutes that were not nearly such apparent examples of arbitrary class legislation and such flagrant violations of the fourteenth amendment as is the time limitation in the case at bar.

In Standard Oil Co. of N. J. v. City of Charlottesville, 42 Fed. (2nd) 88, an ordinance purporting to regulate the storage and sale of gasoline was under consideration and the court granted an injunction to

restrain its enforcement because of its repugnance to the 14th Amdt. At page 91, the court said:

> "As such a regulation, however, it is unreasonable in that its restrictions do not tend to the preservation of the public safety, and in that, by the exception of existing stations from its terms, it denies to the complainant the equal protection of the laws and, under the circumstances of the case, grants a virtual monopoly to the owners of existing stations."

And at page 93:

> "It cannot be said that an ordinance, the purpose of which is the safeguarding of the public in the handling of a dangerous commodity, makes a classification having a fair and substantial relation to its object, where it exempts from its operation established businesses and applies restrictions only to business to be established in the future; nor can such an ordinance be said to treat all persons similarly circumstanced alike. The fact that one is already engaged in a dangerous business manifestly does not put him in a class which can be favored by the state in legislation regulating such business."

In State v. Whitcom, 122 Wisc. 110, the court condemned as unconstitutional under the 14th Amdt. a statute relating to the licensing and punishing of peddlers and transient merchants. While the statute provided that no person shall peddle without obtaining a license, it gave many classes of persons exemption, among them, the nurseryman or farmer who shall have actually raised the products sold, "or shall have owned and been in possession of the same for not less than three months next prior to the sale." At page 118, the court said:

> "*On the police power and the taxing power alike rests the limitation that its exercise shall affect all persons equally.* (Italics ours.) Sec. 1, Art. 1

Const. Wisc.; sec. 1, Amendment XIV, Const. U. S.; State *ex rel.* Kellogg v. Currens, 111 Wis. 431, 434. The uniformity and the equality thus enjoined are construed only with such meaning as to enable practical government. Such command does not require that all property or all persons shall be treated exactly alike, but permits separation of either into classes of property or of persons similarly conditioned or situated, having characteristics legitimately distinguishing the members of one class from those of another in respects germane to some general and public purpose and object of the particular situation." (Citing cases.)

And again, at page 120:

"Again, what possible reason, revenue or police, can justify discrimination between the farmer or mechanic whose goods were purchased three months earlier and one who would offer to the community newly purchased goods of the same kind? Is one more honest than the other? If so, which? Is one more of an expense to protect against? Is either any more certain than the other to have otherwise contributed to the public revenues, or better able to contribute? These questions admit of none but negative answers. * * * Clearly, such classification as this cannot have sprung from any general public purpose, nor be germane to any. It is not equal protection of the laws to all people similarly situated with reference to that law."

And so, in the case at bar, the time limitation has been shown not to have sprung from any general public purpose and not to be germane to any. It unconstitutionally handicaps the appellant who is in the same class as the dealers upon whom the underselling privilege was conferred and it must, consequently, be condemned as unconstitutional.

In Chicago, M. & St. P. Ry. Co. v. Westby, 178 Fed. 619, the employer's liability law of South Dakota was declared unconstitutional by reason of the 14th Amdt. In so holding, the court, at page 625 laid down the following as one of the indispensable conditions for valid class legislation:

> "All who are in a situation and circumstances relative to the subject of the discriminatory legislation indistinguishable from the situation and circumstances of the members of the class must be brought under the influence of the legislation and treated by it in the same way as are the members of the class. 'An act of class legislation to stand in the face of the Constitution must include all who belong to the class—not all who bear similarity in some characteristics to those included, but all who cannot be distinguished from them in that particular characteristic which justifies the act * * *' Sams v. St. Louis & M. R. Co., 174 Mo. 53; Johnson v. St. Paul & Duluth R. Co., 43 Minn. 222, 224; Lodi Township v. State, 51 N. J. L. 402."

The appellant is in a situation and circumstances relative to the differential provision indistinguishable from the situation and circumstances of the dealers of April 10, 1933 and must be brought under the influence and protection of the differential provision. *The appellant cannot be distinguished from the other dealers in the particular characteristic which justifies the differential provision, namely—the lack of a well advertised trade name.*

In Fountain Park Co. v. Hensler, *et al.*, 199 Ind. 95, a statute giving Chautauqua associations, having certain qualifications, the right of eminent domain was held void as violating the 14th Amendment because intended to apply to one corporation alone. At page 467, the court said:

> *"The legislature cannot take what might be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and thereupon enact different rules for the government of each.* (Italics ours.) State v. Julow, 129 Mo. 163; State v. Miksicek, 225 Mo. 561. In the case at bar all Chautauqua companies which, as such, possess common attributes and stand in like situation with relation to any public necessity that might exist for their obtaining a site, are split up, and a subclass—a very small subclass, of such companies, to wit, those which have existed and conducted meetings for 16 days a year continuously for 15 years, and which have held a lease for all of said period on a tract of timber land—has been singled out as the recipient of the benefits conferred by the statute."

In the case at bar, the language used in the Hensler case, is most appropriate. Here the legislature has taken what might be termed a natural class of milk dealers—those selling unadvertised milk in the City of New York—split that class in two by means of the time limitation, and then arbitrarily designated the dissevered fractions of the original unit as two classes and given an underselling privilege to one which it has denied to the other. What could be a clearer violation of the equal protection clause?

In U. S. Automobile Service Club v. Winkle, 128 Oregon, 274, the court was considering a statute which provided for licensing motor club service companies, section 4 thereof providing for a deposit of cash or bond of $25,000 with the state treasurer unless companies rendering service had operated within the state for more than 5 years and had a paid membership of more than 5000 members. In holding Section 4 invalid under the 14th Amdt., the court said:

> "The classification provided for by §4 of the act is not founded upon any substantial difference between the two classes provided for. It denies to plaintiff the equal protection of the laws by imposing upon plaintiff a burden which is not imposed upon one of plaintiff's competitors, which is engaged in the same pursuit at the same time and under like circumstances, and therefore violates the 14th Amdt. of the Federal Constitution."

The holding in the Winkle case must apply to the time limitation in the case at bar. Here the appellant, an unadvertised dealer, must charge 1¢ per quart more for its milk than its competitors. A burden has thus been placed upon appellant which is not imposed upon appellant's competitors, all of whom are engaged in the same pursuit at the same time and under like circumstances.

In *ex parte* Wacholder, 1 Cal. App. (2nd) 260, one Wacholder was arrested for violating an ordinance, §3 of which provided that each retail merchant of flowers and plants engaged in business for more than 180 days last past shall pay an annual license fee of $6. and §4 of which provided that every person and corporation desiring a license and not having been engaged in the business for at least 365 days last past shall, in addition, post a cash bond in the sum of $500.

The court, in condemning the ordinance under the 14th Amdt., held:

> "Here is a plain discrimination between the persons engaged in a like business made dependent upon the time in which they have been so engaged."

In Cook Coffee Co. v. Village of Flushing, 267 Mich. 131, a village ordinance providing that "(c) Those rep-

resenting retail or wholesale establishments which have been engaged in business in the Village of Flushing three months or longer" shall be exempt from payment of fees for licenses under a hawking and peddling ordinance, was condemned and held unconstitutional in view of the Fourteenth Amendment.

In the latter case, as in the Wacholder case, discrimination between persons engaged in the same business based on the length of time in business, was held repugnant to the equal protection clause. The time limitation in the case at bar, must be held unconstitutional for the same reason.

In State v. Hinman, 65 N. H. 103, a statute, requiring certain professional men to obtain licenses, which exempted from its provisions those who resided and practised their profession in the town or city of their present residence during all the time since January 1, 1875, was held void and unconstitutional because "by an arbitrary test, having no reference to skill, learning, or fitness for the practice of the profession, certain persons are exempted from the payment of a license fee to which others of equal, and perhaps superior, acquirements and experience are subjected" and that the exemption was a discrimination "founded solely upon the accidental circumstances of residence or of a change of residence" and therefore fell within the prohibition of the constitution.

What was said in the Hinman case is equally true of the case at bar. By an arbitrary test—existence in business on April 10, 1933—having no reference to skill, learning, fitness, qualification, equipment, or fi-

nancial responsibility for the conduct of the milk business, a selected group of dealers is given the privilege of selling milk at one cent per quart less than all other dealers. The discrimination in the case at bar is even worse because in the Hinman case, the favored group were merely exempted from the payment of a license fee—a handicap which the group discriminated against could probably overcome by charging higher prices for their services after being licensed. Here the appellant is subjected to a burden constituting a continuing competitive disadvantage which it cannot possibly overcome and which means its complete ruin.

For cases in the state of Wisconsin establishing and following the principle that classifications made by a state must not be based on existing circumstances only and must permit new persons and things to take their rightful place in the classification made, see Johnson v. City of Milwaukee, 88 Wisc. 383, 390-392; State *ex rel.* Resch v. Trustees, 121 Wisc. 44, 54; Servonitz v. State, 133 Wisc. 231, 238; Borgnis v. Falk Co., 147 Wisc. 327, 353, 354.

In Nichols v. Walter, 37 Minn. 264, at page 271, the court, in condemning as unconstitutional a law classifying counties and providing a mode for removing county seats according to each classification, said:

> "We quote again from State v. Hammer: 'There must be a substantial distinction, having a reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least,

account for or justify the restriction of the legislation.'

* * *

But the counties were, at the date of the act, identified and their *status* fixed for all time, by reference to the specified event, as fully as though the counties were named. There is nothing in the event which is the basis of classification which suggests any necessity or propriety for a different rule to be applied to the counties thus placed in the two classes. Why one county which had located its county-seat by a vote of its electors twenty-five years or six months before the act passed should require a vote of three-fifths of its electors to remove it, and a county which should so locate it three or six months after the act passed may again remove or locate it upon a mere majority vote, is impossible to conceive, except that the legislature has arbitrarily so divided. But in such matters the legislature cannot arbitrarily so provide. The act is unconstitutional and void."

Just as the counties were identified and their status fixed for all time in the Nichols case, so are the favored unadvertised dealers in the case at bar identified and their status fixed by the date—April 10, 1933—. As long as the State of New York continues to fix the prices at which milk shall be sold in the state (it has been three years already and it will probably be longer) that date will prevent the appellant from coming into the class of unadvertised dealers where it naturally belongs unless this court will grant the appellant the relief it seeks.

In Davis Construction Co. v. Board, 192 Ind. 144, an act which sought to relieve "contractors engaged in bridge and highway construction" from consequences growing out of the increase of prices resulting from the world war, and to allow a cancellation of

their contracts, was declared invalid. The act did not include all contractors, or all contractors of public work, but only the subclass above noted. The court said:

> "An artificial, arbitrary and unreasonable classification, as by designating certain individuals by name or description out of a larger number whose situation and needs do not differ from theirs, is forbidden by the Constitution."

In the case at bar, the legislature might just as well have named the favored milk dealers in the law. If the names of the 150 or more milk dealers of April 10, 1933, who were given the underselling privilege, were written out in the law, would anybody then say that the time limitation was constitutional as having some relation to the legal purposes of the milk control law? Of course not. But the use of the time limitation rather than the specific names of the select group does not change the nature of the classification made by the time limitation from a special, unconstitutional one to a general and constitutional one.

In Louisville & N. R. Co. v. Railroad Comr. of Tennessee, 19 F. 679, at page 695, the court, in holding invalid a statute, a section of which declared that none of the provisions of the act shall apply to any railroad then being constructed, or which might thereafter be constructed in the state "until ten years from and after its completion", said:

> "Wherefore this distinction between existing roads and roads to be thereafter built? If the act was a proper regulation, why not apply it to roads to be hereafter built? If the legislature can thus draw the line between different railroads based on the date at which they were or are to be construct-

ed, where and at what point is legislative discrimination to cease? If the legislature can thus discriminate between new and old roads, it can assume any other arbitrary basis in support of invidious legislation, and in this way oppress one interest for the benefit of another; and if it can do this, the foregoing wise and just provisions of the state and national constitutions, intended to secure an equality of rights to every citizen, may as well be eliminated from those sacred instruments."

In the case at bar, the same question asked in the Louisville case may be propounded: Wherefore the distinction between existing unadvertised dealers and dealers thereafter entering the field? If the underselling privilege classification based upon the well-advertised trade name is constitutional and, appellant cannot and does not question that here, why not give the privilege to new unadvertised dealers. They need the privilege just as much, if not more, than the old unadvertised dealers.

If the time limitation in the instant case operated in favor of new milk dealers, as the limitation in the Louisville case did for new railroads, there would be no question about it being arbitrarily discriminatory, yet such a discrimination would be more logical from the standpoint of its practical effect, for new dealers have to establish themselves in the trade whereas the old ones already have their customers.

In Tugman v. City of Chicago, 78 Ill. 405, the court in declaring invalid an ordinance which prevented the use and operation of slaughter houses erected after the first day of January, 1872, while those erected prior

to that time were left free to be operated as the owners thereof desired, said at page 409:

> "If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and for that reason, void, but its direct tendency would be to create a monopoly, which the law will not tolerate.
>
> The fact that certain persons were engaged in the business within the district designated in the ordinance at the time of its adoption, gave them no right to monopolize the business, nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege who should engage in the business at a later period."

The principle involved in the Tugman case governs the facts of the case at bar. Just because certain unadvertised dealers were engaged in the milk business at the time the first milk control law was enacted, is no reason why they should have had bestowed upon them by the legislature an underselling privilege which created for them a virtual monopoly in the business of wholesaling milk to the exclusion of new dealers like the appellant.

In Alexander v. City of Elizabeth, 56 N. J. L. 71, an act which made it unlawful for anyone to maintain a race course in New Jersey, which was not used for racing purposes prior to the 1st day of January, 1893, unless a certified copy of a resolution of necessity was procured and filed with the secretary of state, provided that with respect to those courses used prior to that date, licenses could be granted without qualification or

restriction. The court, in holding the statute unconstitutional, at page 81 said:

> "It has been inquired, upon what principle can a classification of race courses into those used and maintained before and those used and maintained after January 1st, 1893, be sustained? What, in this view, is the substantial difference between them which requires a different system of legislation applicable to each? Where are the characteristics sufficiently marked and important to make them distinct classes? I can perceive no such differences and no such characteristics; nor can I perceive any reasonable ground on which one class should require any different legislation from that which the other requires.
>
> To make a classification good it must be founded upon differences and characteristics sufficiently marked and important to make them naturally a class by themselves. (Citing cases.) There are no qualities in race-courses which are sufficiently marked and important to distinguish those in use prior to January 1, 1893, from those set up after that date. Legitimate classification rests on the quality of its members, not on the particular time when those qualities were acquired. (Citing cases.)"

And so, in the case at bar, as in the Alexander case, legitimate classification should rest on the quality or nature of milk dealers, not on the particular time when that quality or nature—the quality of being an *unadvertised* dealer—was acquired.

For other cases in the state of New Jersey, condemning arbitrary time limitations, see State v. Post, 55 N. J. L. 264; State *ex rel.* Pierson v. O'Connor, 54 N. J. L. 36; Pavonia Horse Railroad Co. v. Jersey City, 45 N. J. L. 297; Stahl v. Trenton, 54 N. J. L. 444.

In Sutton v. State, 96 Tenn. 696, a so-called "no fence law" was under consideration. The counties in which it was to operate were classified by population solely with reference to the census of 1890, without making any provision as to changes of population that might occur or be shown by any subsequent census. The court held the law invalid and laid down this rule as to valid class legislation:

> "Legislation intended to affect a particular class, and not the public at large, must extend to and embrace equally all persons who are *or may be* in the like situation and circumstances, and the classification must be natural and reasonable, not arbitrary and capricious."

The vice of the time limitation in the case at bar lies in the fact that it does not permit new dealers who enter the field selling unadvertised brands of milk to take their lawful place in the classification of unadvertised milk dealers. The legislature, by inserting the time limitation in the privilege provision, lost sight of the fact that new unadvertised dealers would be in the same class as the existing unadvertised dealers and would require the underselling privilege to meet the competition not only of the well-advertised dealers but also of the longer established unadvertised dealers.

In Pabst Corporation v. Milwaukee, 190 Wisc. 349, it was held that a classification of public utilities for the purpose of regulation, *into those in existence before and those created after a specified date* is purely arbitrary and without reason and was invalid.

In Northwestern National Insurance Co. *et al.* v. Fishback, 130 Washington 490, the court held invalid

a statute which provided that no insurance company, writing fire or automobile insurance, shall have more than one agent in any city of this state having a population of 50,000 or less, or more than two agents in cities of over 50,000 inhabitants. The court after holding that the occupation of insurance agent is a lawful business, and not one which it is within the power of the State to prohibit, stated at p. 494:

> "But the act of 1923 is not an attempt to regulate the insurance business. It is, in effect, nothing more than the creation of a favored class, who are permitted to engage in the lawful business of acting as insurance agents to the exclusion of everyone else from that business; and this excludes a great number of persons who, from time immemorial, have acted as insurance agents. We all know that real estate agents, lawyers and persons following many other lines of business, have been accustomed to write insurance as a 'side line.' We cannot but feel that the legislature had in view no welfare of the public, but that this legislation is an attempt to monopolize the business of writing insurance. We agree with what the Supreme Court of Missouri, in Moler v. Whisman, 243 Mo. 571, said in holding unconstitutional a law passed in the interest of barbers.
>
> 'Possibly some barbers, like some lawyers and other persons who have obtained successful and remunerative positions in professional and commercial life, become anxious to shut out competition by "burning the bridges behind them" so to speak; but such a scheme is entirely un-American, because it is the policy of a free commonwealth to encourage thrift and industry among its citizens, and to keep the door of opportunity ajar so that every qualified and deserving person who so desires may enter thereat.'"

In this case, the favored class, the independent dealers of April 10, 1933 have "burned the bridges behind them" by closing the door to appellant and others

similarly situated—a most un-American and unconstitutional scheme.

Two similar cases in New York State in which certain persons engaged in the insurance and undertaking businesses had attempted unsuccessfully to shut the door to new competition in their respective fields are Hauser v. N. B. & Merc. Ins. Co., 206 N. Y. 455 and People v. Ringe, 197 N. Y. 143. See Southeastern Electric Co. v. City of Atlanta, 179 Georgia 514, for still another such case with respect to the electrical business.

The cases discussed under this point show quite clearly that it has been uniformly held throughout the various jurisdictions that discriminations between persons engaged in a like business based upon the time of entry into the business or made dependent upon the time in which they have been so engaged are arbitrary and unconstitutional. The inevitable conclusion, therefore, is that the appellant has been unconstitutionally barred from taking its place in the "unadvertised" class and must hereafter be given the underselling privilege presently exercised by members of that class.

POINT III.

The time limitation is separable and may be excised from the unadvertised differential provision without doing violence to the intention of the Legislature and without hampering or impairing the effectiveness of the provision or the Milk Control Law. On the contrary, its deletion will carry out the purpose of the provision and of the entire law.

The appellees will probably contend here as they have urged in the courts below that this court is with-

out power to delete the arbitrary time limitation from the unadvertised differential provision and allow the remainder of the provision to stand, despite the fact that the remainder of the provision, without the time limitation, will be workable and will carry out the purpose for which it was enacted, namely the protection of unadvertised dealers from the well-advertised dealers in the City of New York.

The court below found the time limitation to be constitutional; hence, it was not necessary to consider and the court did not pass upon the question of severability. It is only when a part of a statute is held *unconstitutional,* that the question of its *severability* arises.

In the dissenting opinion, however, the time limitation was found to be unconstitutional and, quite properly, the dissenting judges gave their attention to the question of severability and found that the time limitation was separable and could be deleted from the unadvertised differential provision (R., p. 60).

Appellant submits that the conclusion of the dissenting judges below is entirely correct. It is fundamental that courts are reluctant to declare unconstitutional any greater part of a statute than is absolutely necessary for a decision in the case on the facts involved. Furthermore, the very same section in which the unadvertised differential provision appears (§258-q-Ag. & Markets Law) contains a separability clause which provides that a judgment of invalidity of any clause, sentence, paragraph or part of the article "shall not affect, impair or invalidate the remainder thereof, but

shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered."

The presence of the separability clause in the milk control law

> "has the effect of reversing the common law presumption, that the legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility; and this presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that the legislature would not have been satisfied unless it had included the invalid part. Williams v. Standard Oil Co., 278 U. S. 235, 241-2."
>
> Utah Power & Light Co. v. Pfost, 286 U. S. 165, 185-6.

And in Champlin Refining Co. v. Commission, 286 U. S. 210, at pages 234 and 235, this court said:

> "The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped *if what is left is fully operative as a law.* (Italics ours.) Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 565. Pollock v. Farmers Loan & Trust Co., 158 U. S. 601, 635. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 395-396. Field v. Clark, 143 U. S. 649, 695-6."

The recent cases in the Court of Appeals have clearly shown the attitude of the New York State Courts. In People *ex rel.*, Alpha P. C. Co. v. Knapp, 230 N. Y. at page 60, Chief Judge Cardozo, after stating that the

state court could speak with final authority on the propriety of severance, said:

> "In this State, we have gone far in sub-dividing statutes, and sustaining them so far as valid. The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. The principle of division is not a principle of form. It is a principle of function."

And at page 63:

> "Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert."

Even where a single section of a statute attempts or purports to cover two entirely distinct and separate classes of cases, one properly and the other improperly, it may be upheld as to the class which constitutionally may be thus covered even though condemned as to the other. Dollar Co. v. Canadian C. & F. Co., 220 N. Y. 278 and cases cited at page 279.

The legislative presumption, as well as judicial presumption and precedent, requires that this court be able to see upon the face of the differential provision or *that appellees must show by something far more substantial than a mere guess or conclusion that the time limitation is so inherently connected with the differential provision in subject matter, meaning or purpose, that it cannot be presumed the Legislature would have passed the latter without the former. In re* Village of Middletown, 82 N. Y. at p. 202; People v. Kenney, 96 N. Y. at p. 303; People v. Briggs, 50 N. Y. 566.

And so, in the case at bar, the reason for the enactment of the differential provision, as found by this court in Borden's Farm Products Co. v. Baldwin, *supra*—protection of unadvertised against advertised dealers—will be carried out by deleting the unconstitutional time limitation from it. The burden is upon the appellees to show otherwise.

As was said by the dissenting judges in the court below (R., p. 60):

> "With the arbitrary time limitation excised from the unadvertised differential provision, the appellant will assume its rightful place in the class of milk dealers selling unadvertised milk and be able to meet the competition if it can, not only of the well-advertised dealers, but also of the unadvertised dealers who already have an established business and are selling the same product in the same territory as the appellant. Thus will the arbitrary, unreasonable and invalid time limitation be destroyed and at the same time the original purpose of the law, to protect the milk producer, to preserve competition and to stabilize milk prices, be promoted and safeguarded."

A glance at the remainder of the unadvertised differential provision shows a complete, workable provision carrying out the purpose of the legislature underlying its enactment—the protection of unadvertised milk dealers in the city of New York against the well advertised dealers of that city:

> "It shall not be unlawful for any milk dealer who [since April tenth, nineteen hundred thirty-three] has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more

than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

It is respectfully submitted that the order and judgment of the Supreme Court of the State of New York affirming the order of confirmation of the Appellate Division and the determination of the Appellees should be reversed with costs and disbursements to the Appellant, in all courts.

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